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No. 86-2063

In the Supreme Court of The United States

October Term, 1986

DOUGLAS JAMES MAHR

and

MARY ELIZABETH MAHR

Petitioners

Against

NATIONAL BROADCASTING COMPANY, INC., RCA CORPORATION, JOSEPH CATES CO., INC., PERPETUAL MOTION PICTURES, INC., RANDOM HOUSE, INC., JANET SCHULMAN, STAN BERENESTAIN AND JAN BERENSTAIN

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lawrence R. Barba
(of record)

(213) 859-1321

Ralph F. Server

9460 Wilshire Blvd.
Suites 500 and 525
Beverly Hills, CA 90212

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QUESTIONS PRESENTED

. Where the wife of plaintiffs' attorney in a letter to the Court criticizes a Judge for his conduct in the courtroom, may the court impose Rule 11 sanctions against the attorney and/or his clients for such criticism, or is such speech protected first amendment expression for which disciplinary sanctions against the clients and/or the attorney are unavailable.

. To what extent may use of an unpublished fictional work be made or incorporated in another work without infringing the owner's exclusive rights to prepare derivative works under s 106(2) of the new Copyright Act?

. Where a work of fiction is unpublished is the fair use doctrine a key factor in determining infringement or is the fair use doctrine applicable only

to factual works?

. Is the idea/expression dichotomy applicable to unpublished works of fiction or is the content analysis approach of Harper the standard imposed on unpublished works.

. Where a third party with whom plaintiffs and defendants were dealing had possession of plaintiffs' work during a crucial period, is such a showing sufficient to establish access.

. Is an appeal properly before an appellate court where all the issues are not final and where the trial court reserved the right to modify attorneys fees as damages for Rule 11 violations, or does such reservation of power prevent its holding from becoming a final judgment?

. In a copyright case, when unrebutted expert testimony is

presented at the trial level on a summary judgment, is the court free to ignore the testimony of the experts on the issue of copying, or must the court make a factual determination as to the reliability of the testimony?

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The March 19, 1987 filed Opinion of the Court of Appeal is set out in Appendix A to this petition. The Judgment of the United States District Court is unpublished and is set out in Appendix B to this petition. Appendix C is a Statement of Uncontroverted Facts and Conclusions of Law Pursuant to Local Rule 7.14.1.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.(1). The filing period for obtaining a Writ of Certiorari is 90 days from entry of judgment. 28 U.S.C. Section 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I. Section 8, clause 8 of the United States Constitution provides in pertinent part:

> "The Congress shall have the power...to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

FIRST AMENDMENT

Congress shall make no law... abridging the freedom of speech or press.

FIFTH AMENDMENT

No person shall be deprived o life, liberty, or property, without due process of law."

STATUTES INVOLVED

The 1976 Copyright Act: 17 U.S.C. Section 101 et seq., effective January 1, 1978.

28 U.S.C. Section 1927:

> "Any attorney. . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys fees reasonably incurred because of such conduct."

F.R.C.P. 11 provides in pertinent part that:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

INITIAL BASIS FOR JURISDICTION

Jurisdiction of the federal courts was based on 28 U.S.C. Section 1338(a) and (b)

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STATEMENT OF THE CASE

A. Relevant Procedural History

In this copyright action, the Honorable Francis C. Whelan heard oral argument on April 23, 1984 on respondents' motions for summary judgment. The District Court judge took the matter under submission. Then, on or about April 23, 1984, Counsel for petitioners' lawyer's wife wrote a letter to Judge Whelan regarding the courts demeanor. On June 19, 1984, Judge Whelan ordered petitioners' lawyer Mr. Murphy to file a declaration concerning the letter of his wife. On June 25, Mr. Murphy did file a declaration stating that he was aware of the letter but that he did not counsel her in any way during her writing of the letter nor would he interfere as he felt that she had a perfect right to express herself to a jurist. At no time did he ever encourage her to write the letter.

On December 3, 1984, Judge Whelan ordered the submission of the Motions for

Summary Judgment be vacated in view of petitioners' lawyer's "attempting to justify the action of his wife in writing a private letter to the Court "and because of what appeared to be to the Court questionable conduct by petitioners' lawyer. Judge Whelan proceeded to transfer the case to the Honorable A. Andrew Hauk on December 4, 1984. The summary judgment motions were re-argued on April 3, 1985.

Judge Hauk, at the hearing, announced his ruling in favor of the respondents and gave instructions to respondents' counsel to revise and resubmit a statement of uncontroverted Facts and Conclusions of Law consistent with his oral rulings. The judge ordered counsel to bring a separate motion on the issue of attorneys' fees and costs and setting a new hearing date on that issue.

On June 10, 1985, respondents' motions for attorneys' fees and costs were granted in part and denied in part. The Court found that petitioners and/or their attorney were

liable for a total amount of $21,716.95 as extra expenses incurred as a result of respondents having to rebrief and re-argue their summary judgment motions before a different district judge.

B. Jurisdiction

The district court had subject matter jurisdiction pursuant to 28 U.S.C. section 1338; but the Ninth Circuit had no jurisdiction pursuant to 28 U.S.C. section 1291.

C. The Appeal Was Never Properly Before The Appellate Court

The district court's order of June 10, 1985 was not appealable pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The Berenstains had counterclaimed for defamation. The district judge absent-mindedly entered judgment on the case and admitted in open court that he had never certified the appeal. This, the court admitted on a separate motion on December 8, 1986 in the Court of the Honorable Judge A.

Andrew Hauk whereupon petitioners sought to reinstate a separate cause of action for implied contract. The court stated that it had no jurisdiction to entertain the motion and that petitioners recourse was a malpractice action against their attorney. Petitioners have yet to receive an Order on this issue.

D. The Appeal Was Premature

On June 13, 1985 the court filed a Notice of Entry of Judgment. Plaintiffs filed a Notice of Appeal on July 10, 1985, and an Amended Notice on July 12, 1985. On July 16 and 17, 1985 defendants filed a Notice of Cross-Appeal. Plaintiffs' appeal was premature because an outstanding counter claim for defamation was unresolved; for lack of a valid certificate of good cause requiring specific findings; and because the district court reserved power to reconsider the same issues concurrently with appellate court in its Findings of Facts and Conclusions of Law.

STATEMENT OF FACTS

Respondents Stan and Jan Berenstain are the authors of "The Berenstain Bears," a fictional bear family which stories were published beginning in 1962.

In January of 1979, Stan Berenstain met with Joseph Cates who informed Stan Berenstain that NBC had agreed to develop and broadcast a Berenstain Bears Christmas special. Cates was also interested in developing additional bears television specials. In January 1980, NBC purchased from Cates a package of three additional Berenstain Bears specials, including the as yet unwritten "Easter Surprise".

In September of 1980 animation for the first television special began. "The Easter Surprise" was first aired on April 14, 1981.

The story in "Surprise" concerns Boss Bunny (the Easter Bunny) who has quit his job as the Easter Bunny because nobody really cares about Easter anymore. Consequently, there will be no Easter. The plot centers on

young Brother Bear's attempts to convince Boss Bunny to bring Easter to Bear country because his mother has promised him a special Easter Surprise, which he will not get if the season's remain stuck. The story is told in flashback to a year when winter refused to leave Bear Country to the fall preceeding the long winter.

The story opens when young Brother Bear leaves his tree house to take Papa Bear his lunch. On his way Brother Bear climbs trees, jumps in puddles, meets his animal friends, who unfortunately, have nothing in common with him. This makes Brother Bear very lonely.

After he reaches Papa Bear, and while traveling back home Brother Bear asks Papa Bear childhood questions to which Papa claims to have all the answers. He does not.

As fall turns to winter, Brother Bear's friends disappear and he is more and more lonely because of it. When winter persists, Papa Bear believes that "the seasons got

stuck." There will be no Easter. Mama Bear expresses concern about Spring. "What's Easter," asks Brother Bear. Papa, in song, explains Easter in terms of Easter eggs, candy treats and the Easter Bunny. Mama counters this by explaining in song that Easter means the onset of Spring, a new beginning, and "the miracle of birth." Mama tells Brother that he can expect "an extra special Easter surprise."

The Bear family then goes to the Easter Bunny's mailbox where the Bear Country populace gathers in expectation of seeing Boss Bunny signal Spring by wiggling his ears. Instead, they are confronted with a sign saying "Boss Bunny has quit."

Papa then gets the idea of becoming the Easter Bunny himself, thereby saving Easter and Spring. But he fails in his attempt.

Brother Bear sets out to find the Easter Bunny and runs into his son who takes Brother Bear to his father's home and factory, which factory is deserted. At his home they find

the Easter Bunny fast asleep. Brother Bear asks the Easter Bunny about Easter and Spring. The Easter Bunny replies that he is bored with it; that he is old and tired, and he doesn't need the aggravation of moving the seasons along and bringing Easter. Besides, who cares about Easter?

As Brother Bear is about to leave the Easter Bunny sees the "Great Spring Rainbow". With a change of heart the Easter Bunny pulls the switch to the Easter factory. The factory moves into operation, and Easter and Spring are saved.

The "Easter Hippopotmus tells the tell of a flood in a small Southern California town. The lood threatens to prevent the Easter Bunny from reaching the town. Eloise, a pink hippopotamus, decides that she will do the Easter Bunny's work and sets out to find him. When she does the Easter Bunny takes her on a tour of the Easter egg factory. He tells her that no body cares about the real significance of Easter anymore; that he will

not bring Easter until people learn. But Eloise tries to convince the Easter Bunny to deliver Easter in spite of the flooding rains. The Easter bunny admits that this will be the first time that Easter Baskets will not be delivered. Eloise leaves and prays for the Easter Bunny to change his mind. She falls into a deep sleep and awakes with a "floatilla [sic] of ducks "bring her baskets of Easter treats. One of the baskets includes a card from the Easter Bunny who asks Eloise for her help in delivering the baskets. Eloise attempts to deliver the treats to the children, but they attack her with rocks. She ultimately wins the children's favor by saving some from drowing. At the end she is acclaimed a heroine and is enshrined in the Easter Bunny Hall of fame.

SUMMARY OF ARGUMENT

The Congress has consistently recognized the need

> "to preserve the common law protection of undisseminated works

> until the author or his successor chooses to disclose them".

Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong. lst Sess., 41 (Comm. Print 1961). As the Court recently concluded:

> "First publication is inherently different from other section 106 rights in that only one person can be the first publisher;

The Senate Report makes it clear that Congress intended that the unpublished nature of a work would figure prominently in "use" analysis because the commercial value of such a right is in its exclusivity. As noted in Harper & Row, Publishers, Inc. v. Nation Enterprises 105 S. Ct. 2218 this court said:

> "Because the potential damage to the author from judicially enforced "sharing" of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use

inevitably shifts."

The Ninth circuit's view of our copyright law is in sharp contrast to this Court's and the Senate's emphasis illustrating fair use:

> "The same general standards of fair use are applicable to all kinds of uses of copyrighted material."

Senate Report, at 64.

This Court in Harper and Row, Publishers, Inc., supra, confirmed Congress' intent that the unpublished nature of a work is a key factor to be addressed concerning "use" of an unpublished work. The Ninth Circuit, however, presumed that use may be made of an unpublished work on the ground that whatever use was made of the work it was allowable under the law.

The Ninth Circuit's presumption is that the unpublished nature of the copyrighted work is irrelevant thus allowing use of the work so long as in its view the works are not substantially similar.

The detriment to author and public alike is that such a presumption undermines assurance of the necessary time needed to develop ideas free from the fear of misappropriation of the author's as yet unpublished work, thus allowing the author to retain control of his work throughout its critical stage:

> "the period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor."

Harper and Row, Publishers, supra.

The lower courts erred in determining whether the ideas contained in the unpublished work were actually copyrightable. The issue is not what is copyrightable, but whether any copying is a violation of the right of control of the already elaborated and/or detailed ideas. Respondents sought to be the first to publish certain ideas. But they had no right to actively incorporate the value of the unpublished work into their own

work, thus usurping first publication rights of petitioners' copyrighted writings.

> "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."

Sony Corp. v. Universal City Studios, Inc., 464 U.S., at 541, 220 USPQ at 665.

Respondents exploited the copyrighted material and they did so free of charge. They did harm not only to the original work but also did even greater harm to the market for derivative works. The fact that the concepts chosen by respondents to tell their story may have been only elaborated ideas taken from the petitioners is not any valid reason justifying the unauthorized copying of the authors' hitherto private work. Fair use presupposes good faith and fair dealing. Here the lower courts accepted respondents' argument that whatever use made of petitioners work was lawful because respondents had only taken such material as

the law allows. As if to say that the whole of the copyright is not the property of the author. In the common law, however,

> "The property of the author . . . in his intellectual creation [was] absolute until he voluntarily part[ed] with the same."

American Tobacco Co. v. Werckmeister, 207 U.S. 284, 299 (1907); 2 Nimmer 8.23, at 8-273.

Indeed, it must not, and can not, be fair to transform unpublished works, prior to their debut in the stream of commerce and then argue that all that was taken were those elements that were uncopyrightable. There can be no public interest in having available to competitors the fullest detailed information on the idea of an Easter Bunny going on strike. This even if the court could find that "ideas are as free as the air." There is no question that this is a correct statement of the law,and Respondents were free to "take from the air" a similar

story. What was at issue was respondents use of petitioners' manuscript, not what could be taken legally from a private and unpublished work.

ACCESS

The Random House Publishing Company (one of the respondents in this case) was submitted a copy of "The Easter Hippopotamus" in August of 1980, and again in December of 1980.

1. IT IS AN UNDISPUTED FACT THAT THE REVIEWING EDITORS AT RANDOM HOUSE SAW PETITIONERS MANUSCRIPT.

The Ninth Circuit and the district court conceded that Random House had in their hands, during a relevant period of time, the manuscript of the "Easter Hippopotamus." It is also undisputed that defendants Stan and Jan Berenstain publish exclusively with Random House. Their editor is Janet Shulman with whom the Berenstain's have had direct dealings.

Under these circumstances it seems clear that a trier of fact could reasonably infer

that a triable issue does exist as to whether the Berenstains had in their possession a copy of the manuscript given to them by their editor Janet Shulman. Whether this is what actually happened addresses the credibility of Janet Shulman whose deposition testimony raises a credibility issue. On the other hand the Ninth Circuit doubted the importance of Random House having access to petitioners manuscript because

> "all of the defendants involved in the production of "The Easter Surprise" unequivocally denied having seen appellants' work."

This is hardly conclusive proof of their defense. In point of fact and law, it is undisputed that petitioners and defendants Stan and Jan Berenstain were dealing with Random House between August of 1980 to December of 1980.

DeAcosta v. Brown, 146 F. 2d 408 (2nd Cir. 1944), cert. denied , 325 U.S. 862, 65 S. Ct. 1197, 89 L.Ed 1983 (1945), held that

where a third party with whom plaintiff and defendant were dealing had possession of plaintiff's work during a crucial period, it is a sufficient showing to establish defendant's access."

Janet Schulman admitted reading petitioners manuscript during the months of August through December of 1980.

The Ninth Circuit chose to believe the affidavits of the defendants and thus usurped the domain of the jury as to the credibility of both Ms. Schulman and Mr. and Mrs. Berenstain. The inconsistencies in the deposition testimony of Janet Schulman is all too evident. First, defendant Shulman stated in unqualified terms that she

> "had never read 'The Easter Hippopotamus'" (Schulman depo. p. 31 lines 6-14)

She also stated that the only time she had seen it was after the lawsuit was filed:

> "when I was served (Schulman dep., p. 31, lines 11-14)

Later in her deposition testimony she contradicts her earlier testimony by finally admitting reading "The Easter Hippopotamus" manuscript which was given to her by her then assistant Merrill Wolf.

Therefore, as a matter of law, access by Random House is conclusively proved.

SANCTIONS

1. Where the wife of plaintiffs' attorney criticizes a judge for his conduct in the court room, may the court impose Rule 11 sanctions against the attorney and/or his clients for such criticism, or is such speech protected first amendment expression for which disciplinary sanctions against the clients and/or the attorney are unavailable?

In this case Rule 11 sanctions against the attorney and his clients exceeded the limits of the court's discretion. Such sanctions against "innocent" clients on account of the behavior of their attorney's wife is an abuse of the court's power. It is even questionable whether the attorney for

clients violated any rules of professional conduct, but even if he had, such conduct should not have been imputed to the attorney's clients. Letters critical of judges have been the subject of disciplinary action where committed by an attorney; but where, as here, innocent parties are made to suffer for the acts, not of their attorney, but of his wife, the court should have declined to impose sanctions against such innocent parties.

Given the indiscriminate lumping of sanctions against the clients, and their attorney for the behavior of attorney's wife, such sanctions are an abuse of discretion when imposed on attorney's clients for the only reason that the clients happened to be in the wrong place at the wrong time. A lawyer's wife's letter to a judge, criticizing the conduct of the sitting judge, ought not to be grounds for imposition of sanctions against innocent parties.

The circumstances of the case are very

unique and petitioners Mr. and Mrs. Mahr, (the plaintiffs in this case), have found no case law providing unequivocalable support for the court's imposition against them of such harsh sanctions. If the letter written to the Judge by the wife's attorney is imputed to him is not the type of criticism involved herein protected first amendment expression for which such wife has a guaranteed right?

It is well settled that judicial officers may never be held immune from suit or criticism; but it is also true that attorney's may not make improper attacks upon a judicial officer. Moreover, if there is ground for complaint against a judge it is the duty of a lawyer to submit his grievance to the proper authorities. In this case, however, the attorney did not write the letter to the judge, nor did the wife write the letter on his behalf. The attorney violated no rules of conduct; nor did he attempt, or intend, to control the conduct of

his wife at any time. If attorney Richard Murphy is guilty of anything it is that he failed to dissuade his wife from asserting her right to speak up and to criticize. Such behavior, however, is not grounds for sanctions and is not punishable under these circumstances.

REASONS FOR GRANTING THE WRIT

The legislature in the new Copyright Act sought to insure that the copyright law would provide the necessary monetary incentive to write, publish and disseminate creative works. The law is aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his or her copyright.

In Harper and Row, 105 S. Ct. at 2233, this Court enforced the Copyright holder's exclusive right to determine whether and, if so, when, where, and in what form to publish a work. Quoting the late Melville Nimmer, the Court also stressed its obligation to protect all a copyright holder's exclusive

rights expressed in section 106, including the right to prepare or authorize the preparation of derivative works. Id. at 2234-35.

The language of section 106 suggests that infringement includes more than just copying. If the new Act's language can be taken literally, a defendant need not copy verbatim or even paraphrase a copyrighted work, as long as he uses it and the resulting work can be seen as "based upon" the copyrighted work. The legislative history is consistent with this interpretation.

The following are proposed reasons for granting this writ on the copyright matters:

1. The Court should interpret the new Act literally to prohibit conduct inconsistent with the copyright holder's exclusive rights.

2. The Court should also evaluate the economic significance of any copying.

3. Substantial similarity should not be considered the only relevant

circumstantial evidence of copying. (In most jurisdictions substantial similarity is circumstantial evidence of copying. In the Ninth Circuit it is considered an element of the offense.)

These suggestions fairly balance the competing interests of free competition and reasonable proprietary expectations, thus focusing on conduct and any advantage derived from defendants unfair behavior.

A further reason for granting this writ is the question concerning sanctions under F.R.C.P. Rule 11 and its potential for encroachment upon constitutional rights. A sanction against an attorney's client imposing in excess of $20,000 as a fine because the attorney's wife wrote a critical letter to the judge seems unduly severe, perhaps even illegal, and an infringement upon a parties's freedom of speech rights.

Last and equally important is whether or not the Ninth Circuit had appellate jurisdiction where the district court

reserved power to determine at any time the very same issues that were pending on appeal.

These important federal questions, including a conflict in the circuits on the jurisdictional question, need to be addressed by this Court.

INTRODUCTION

The new Copyright Act of 1976 equates far more closely to the marketplace than did the old Act. The apparent shift in emphasis from idea expression to fair use is exemplified in Harper & Row, Inc. vs. Nation Enterprises, supra and in sections 106-118 of the Statute. It asks the singular question of whether the "use" of the work of one creator by an imitator is sufficiently harmful to the original work to permit recovery particularly in the area of unpublished works. It is a real world approach and deals with whether or not key elements of a work have been appropriated.

For several years the Ninth Circuit's approach to copyright law has violated "due

process" and other constitutional guarantees. It has created its own backwater of law which is at odds with this court's consistent teachings, and, as the largest Circuit court in the nation, there is a need to bring its recent holdings into harmony with this Court's paramount holdings. These aberrant holdings have been developing over the last several years; and it is time for this Court to halt the nonconformity.

The Ninth Circuit has been unreasonable, arbitrary, and capricious. It has affirmed that the intrinsic prong of the Krofft test may be decided on Summary judgment. See vs. Durang, 711 F.2d 141 (9th Cir. 1983).

This conflicts with the landmark Krofft case and Twentieth Century Fox Film Corp vs. MCA, Inc., 714 F.2d 1327 (9th Cir 1983). If triable issues of similarity of ideas are found, then it is the trier of fact who must decide the issue of infringement.

ARGUMENT

In this case, the Defendants suggested,

and the Court accepted, an incorrect standard to prove infringement (whether a lay observer would recognize defendants' work as a dramatization or picturization of plaintiffs work).

It is not, and never has been, the Plaintiffs burden to demonstrate that a jury "would" ultimately decide for Plaintiffs, only that it "could" properly do so. Furthermore, the degree of proof Plaintiff must present to the Court need not rise to the level suggested by the Defendants. In this instance, the Court, on a summary judgment motion, need not mistake one work for another; it need only find a sufficient similarity on the objective similarities as would suggest copying the work. Once copying is established a jury must then decide whether the second work is too imitative of the earlier work. Put another way, was the later work a "copy of the original work thus violating the exclusive reproduction right under section 106(1) of the Copyright Act of

1976.

Krofft emphasized a different standard for works catering to a "child audience." This standard for children was never addressed by the lower court. Summary judgment in this case, and in this situation, then, is highly improper in light of this circuit's adoption of the "child audience test" and the Inverse Ratio Rule summarized in Professor Nimmers treatise [Krofft, 562 F.2d at 1127]. Plaintiffs' position under 106 (1) of the Act is that copying may be shown by the usual method of access coupled either by a high degree of similarity or the more unusual striking similarity (with the latter method existing independently of the former). The Declarations of PROFESSOR CONDREN and DR. GRAVES demonstrated that "The Easter Surprise" was not only "substantially similar" to "The Easter Surprise" but "strikingly similar" as well. Such expert testimony cannot be avoided by the lower Courts.

1. ONCE SUBSTANTIALITY IS DEMONSTRATED BY EXPERT TESTIMONY, THE ISSUE OF PERCEPTIBLE COPYING MUST GO TO THE JURY.

Krofft, supra, at 1164 said:

> "If there is substantial similarity in ideas, then the trier of fact must decide whether there is substantial similarity in the expression of the ideas so as to constitute infringement." (Emphasis added.)

The Krofft court went to great lengths to explain that, when dealing with the idea/expression dichotomy, two steps are required: (1) an "extrinsic" test, turning upon objective criteria such as the "subject matter" and "setting for the subject;" and (2) an "intrinsic test based upon the subjective "response of the ordinary reasonable person." The Court noted that the "extrinsic" portion of the analysis is the only step which permits the review of specific criteria" which can be listed and analyzed: Krofft, at 1164, stated:

> "Since it is an extrinsic

> test, analytic dissection and expert testimony are appropriate."

It must be remembered that Krofft's idea/expression dichotomy concerned the sale of factual information and ideas in an advertising campaign and is not applicable in the same way. Krofft was selling a product for consumption. Commercials, by definition, are saturated with facts or ideas inducing purchase of a product. As has been emphasized by this Court, copyright law considers factual works to be fundamentally different from more artistic works:

> "Similarity of expression may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed." Landsberg vs. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir.) cert. denied, 105 S. Ct. 513 (1984)."

The Krofft Court also noted that the determination of whether qualitative similarity of idea exists may be a simple one

and stated:

> The test for similarity of ideas is still a factual one, to be decided by the trier of fact. See International Luggage Registry vs. Avery Productions Corp. 541 F.2d 830, 831 (9th Cir. 1976); Williams vs. Kaag Manufacturers, Inc. 338 F.2d 949, 951 (9th Cir. 1964)."

The clear implication is that analytic dissection is improper in determining whether the expressions of two works are similar, and that a trier of fact must determine whether similarity in expression exists. The fact that the Court's delineation of what may be decided as a matter of law is followed immediately by what must be decided by the trier of fact is no accident. The reason for this is obvious: If the statement of the general idea becomes too detailed it ceases to become a statement of the idea at all, and begins to set forth "concept and feel" or expression of the work. The latter depends upon the response of the ordinary reasonable

person. Our system of justice has a Constitutionally sanctioned method of determining that issue -- the jury system.

2. EXPERT TESTIMONY UNDER KROFFT MAY NOT BE IGNORED BY THE TRIAL COURT.

In this case, both novel and traditional expert testimony were introduced under F.R.E. 702 (testimony by experts). Objections were made by Defendants as to one expert's opinion on a probability curve. Defendants objected to the evidence as not being properly before the Court.

Two recent Circuit Court decisions now bring into sharp focus the role the scientific community plays in admitting novel expert testimony. In U.S. vs. Downing 753 F.2d 1223 (1985), the Court ruled that whether novel testimony is admissible depends on whether it is "helpful" to the trier under F.R.E. 702. The Third Circuit test rejects the long-standing restrictive test of Frye vs. U.S., 293 F. 1013 (D.C. Cir. 1923), wherein it was held that expert testimony

must have general acceptance within the scientific community" and instead applies a broader approach.

In Indian Coffee Corp. vs. Procter & Gamble Co. 752 F.2d 891 (1985), the Third Circuit ruled that the scientific community's, rather than the district court's, opinion controls as to whether the basis of expert testimony is sufficiently reliable under F.R.E. 703. The Court concluded that the district court must make a "factual inquiry and finding as to what experts in the field find reliable" and that the district court "could not substitute its own judgment for that of the expert." No less is required in the instant civil case, especially where, as here, probabilities are a jury issue on ultimate liability.

3. THE KROFFT TEST SUGGESTS EXPERT TESTIMONY ON THE ISSUE OF OBJECTIVE SUBSTANTIAL SIMILARITY OF IDEAS BETWEEN THE WORKS IN QUESTION AS THE MEANS OF ESTABLISHING COPYING.

The Krofft case used an empirical

scientific analysis with respect to the ideas existing in two works. The so-called "extrinsic test" spoke to an objective analysis of the works in question. The test, according to Professor Nimmer, was meant to be a barometer of reliability, and sought to restrict the court and expand the domain of the trier of fact. 3 M. Nimmer at 13.03 [E][8]

4. EXPERT OPINION ACCOMPANIED BY UNDERLYING FACTS IS ADMISSIBLE AND MAY DEFEAT SUMMARY JUDGMENT IF IT APPEARS THE AFFIANT IS COMPETENT TO GIVE AN EXPERT OPINION.

Krofft is consistent with Indian Coffee and F.R. E. 703. Krofft highlights the Court's attempt at scientific objective analysis in copyright matters. The intrinsic/extrinsic test of Krofft was meant to bring greater objectivity to copyright infringement analysis. Thus, extreme deference to the trial court's opinion at odds with unrebutted expert testimony on the issue of extrinsic similarity is no longer

viable. The Ninth circuit test brings impartial scientific objectivity into the courtroom on copyright matters, while at the same time limiting the unfettered discretion of the trial court to ignore the experts. Krofft puts the onus on the party opposing expert testimony and on the district court to decide the sufficiency of an expert's affidavit for summary judgment purposes, particularly where, as here, the expert has backed up his opinion with specific facts.

5. KROFFT HAD BROAD IMPLICATIONS ON EVIDENTIARY MATTERS REGARDING EXPERT TESTIMONY.

PROFESSOR CONDREN and DR. GRAVES explained on what basis they formed their opinions. They described in detail how they arrived at their conclusions. Yet, the district court never addressed the expert testimony; it simply accorded the declarations of opinion no weight and granted summary judgment against plaintiffs. The court below gave no reason for rejecting the declarations. Moreover, the declarations

were uncontested statements of facts and the only reasonable inferences to be drawn therefrom was that defendants copied plaintiffs work. As the parties against whom summary judgment was sought, plaintiffs were entitled to have such inferences drawn in their favor. United States v. Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993, 8 L.Ed. 2d 176 (1961) (see per curium).

It is not clear whether the district court below found for the defendants based on inadmissibility of the expert testimony or that the declarations were insufficient to create an issue of disputed fact thus barring denial of summary judgment. The judgment was wrong on either ground. Fed. R.Evid. 705 states:

> "The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data unless the court requires otherwise."

The courts below did not "require

otherwise." They simply ignored the value of the testimony. Both experts, however, were extremely thorough.

Recent decisions, however, have not applied Krofft in this manner; once expert testimony is introduced and uncontested, that is the say, once objective similarity is shown as to the evidence, and a jury trial is requested, the district court need not find that the similarities as alleged exist to prove infringement beyond a reasonable doubt. It is sufficient that this Court determine only if "reasonable minds could differ on the question and, if so, it should be submitted to the requested jury. Twentieth Century Fox, supra, at 1329.

In this regard, it is not the Plaintiffs' burden to demonstrate that the jury "would" ultimately decide in their favor, only that the jury "could" properly do so. Furthermore, the quantum of proof Plaintiffs must present is not that the jury mistake one work for another; they need only

find a substantial similarity in the general ideas and the expression of those ideas. Indeed, the degree of similarity required where the works in question are geared to a "child audience" is even less. In Krofft the court said "this raises the particular factual issue of the impact of the respective works upon the minds and imaginations of young people." The Court is suggesting that the trier should be aware of the audience for whom the work is directed and that the ability of the audience to discern differences would be much less for a "child audience." This factual issue coupled with expert testimony requires that the issue be submitted to a jury.

6. EXPERT PROFESSOR CONDREN PROVED STRIKING SIMILARITY

Expert testimony which demonstrates striking similarity is an independent method of proving copying under 106(1) of the Copyright Act. Such testimony, by definition, raises triable issues of fact

regarding the extent of the similarities in question. This method of proof may be necessary in "technical" fields, especially in the areas of medium transformation (play to film, or music), where the truly creative author would have no protection otherwise.

Striking similarity is similarity of a kind that can only be explained by copying, rather than independent creation, or prior common source. Stratchborneo vs. Arc Music, 357 F. Supp. 1393 (S.D.N.Y. 1973). PROFESSOR CONDREN, in his sworn affidavit established that the works were not only markedly similar but that it was his belief that the Easter Surprise could not have been created other than by copying:

> "They did not alter the material they took from their own earlier publication. But they did attempt to alter slightly the material they took from Plaintiffs."
> (CONDREN Declaration, lines 23-28).

7. STRIKING SIMILARITY IS BOTH AN INDEPENDENT METHOD OF PROVING COPYING AND AN ALTERNATE METHOD OF PROVING ACCESS.

Evidence of striking similarity is an independent method of proving copying. The leading authority on this issue is Selle vs. Gibb, 741 F.2d 896 (7th Cir. 1984). The Selle court held that the Defendants had successfully rebutted the presumption of copying which arose from expert testimony; in dicta it was also held that the expert's qualifications were also suspect and that his testimony was inadequate to establish striking similarity.

The testimony of PROFESSOR CONDREN is not so deficient.

At issue under 106(1) of the new Act is whether the Defendants "copied" Plaintiffs work. Evidence of similarities is often accompanied by a threshold showing of a reasonable opportunity to copy. Some courts erroneously require evidence revealing the relationship between the similarities and the

prior art (i.e., whether they are commonplace or idiosyncratic). Even then, an inference of copying may be rebutted by other probative evidence. Stratchborneo vs. ARC Music Corp., 357 F. Supp. 1393 (S.D.N.Y. 1973) (hereinafter Stratchborneo).

In this case, it is undisputed that Plaintiffs and Defendants were dealing with Random House, Inc. during a particular time frame. (August 1980.) (December 1980.) DeAcosta vs. Brown, 146 F.2d 408 (2d cir. 1944), cert. denied, 325 U.S. 862, 65 S.Ct. 1197, 89 L.Ed. 1983 (1945), holds that where "a third party with whom plaintiff and defendant were dealing had possession of plaintiff's work during the crucial period, it is a sufficient showing to establish defendant's access." JANET SCHULMAN reluctantly admitted reading The Easter Hippopotamus at Random House. This, in itself, is sufficient to establish access.

Plaintiffs have presented evidence of access, probative similarities, and even the

prior art. Taken together, proof of all three equals "striking similarity." Stratchborneo, at 1403, prescribed the proper burden of proof:

> "[T]o prove that similarities are striking, claimant must demonstrate that such similarities are of a kind that can only be explained by copying, rather than by coincidence, independent creation, or prior common source."

8. PETITIONERS' TWO EXPERTS DEMONSTRATED THAT THE SIMILARITIES COULD ONLY HAVE OCCURRED THROUGH COPYING

Though neither expert labelled the similarities as striking by use of a legal term, the overall impression of both was that the work "The Easter Surprise" could not have been independently created. In other words, the second work could only have been a result of copying. A mere label, of course, will not substitute for a showing that precludes coincidence, independent creation, or prior common source. PROFESSOR CONDREN, however,

examined not only the works in question but even other works of the accused authors. He examined the state of the art sufficiently to evaluate the peculiarity of the similarities. He showed that the similarities between the works were not traceable to a common source-- that the similarities were not of the kind expected and basic in the context of other artistic works or even in its own context. PROFESSOR CONDREN's testimony also showed how the plagiarism was accomplished and why independent creation was impossible. He thoroughly evaluated the significance of the similarities.

On the other hand, expert LAVERNE GRAVE's testimony was natural in a copyright setting. Admittedly, though exact precision on a probability curve was not possible, his ultimate conclusion was that the similarities occurring, as they did by chance were "microscopically small" - one in TWENTY TRILLION MILLION. It is interesting to note that in fifteen areas of similarity (see

expert Declaration of PROFESSOR CONDREN), DR. GRAVE points out that all of the events characterized are substantially independent of each other. That is to say:

> "The occurrences of one of them does not influence the probability that one or more of the other events will occur."

9. THE ISSUE OF STRIKING SIMILARITY MUST BE TRIED

Respondents, in their initial moving papers, failed to address the issue of striking similarity advanced by two expert witnesses. Nor did they offer rebuttal testimony on the issue of striking similarity.

Petitioners properly submitted expert affidavits to the district court which Respondents chose to ignore by not presenting contrasting expert opinions of their own. They did nothing to rebut this evidence as they were required to do. Rowan vs. U.S., 219 F.2d 51 (5th Cir. 1955). Where an affidavit and the facts therein are not contradicted, their veracity is admitted.

Morrison vs. Walker, 404 F.2d 1046 (9th Cir. 1968). There is clearly a material triable issue of fact as to the extent of similarities between the works which must be presented to the jury on the issue of perceptible copying. See Testa vs. Janssen, 492 F. Supp. 198 (W.D.P.A. 1980).

Furthermore, though access is shown in this case, it need not necessarily be proven according to Stratchborneo, supra, and, of course, the landmark case of Arnstein vs. Porter, 154 F.2d 474, (2nd Cir. 1946).

10. THERE IS SUFFICIENT EVIDENCE OF ACCESS TO CREATE A TRIABLE ISSUE.

In Respondents' papers it was suggested that it is the Plaintiff's burden to prove the exact means used by the accused author to copy from Plaintiff's original work. Were this the standard, it would be virtually impossible to prove the exact date and time that access occurred.

Once again, access has never been defined as the offering of proof as to how a

defendant actually viewed the copyrighted work. The accepted standard is that the plaintiff must only show that the defendant had a reasonable opportunity to view the work. Beyan vs. Columbia Broadcasting System, Inc., 329 F. Supp. 601, 605 (S.D.N.Y., 1971); Blazen, Inc. vs. Deluxe Game Corp., 268 F. Supp. 416, 422 (S.D.N.Y., 1965).

It is undisputed that Plaintiffs submitted their work to Random House, Inc., to MERRILL WOLF and JANET SCHULMAN. It is also undisputed that the BERENSTAINS' publisher is Random House, Inc., and that JANET SCHULMAN is the editor of the BERENSTAIN and that she has had direct dealings with them. What is disputed is whether the BERNESTAINS had actual access. Because of this dispute, there are triable issues of material fact on that issue.

Plaintiffs have submitted specific proof that their work, the "Easter Hippopotamus" was submitted to Random House, Inc., during a

relevant period (August of 1980). Since the BERENSTAINs publish exclusively with Random House, a trier of fact could reasonably infer that they had sufficient access to view the work and to copy it, particularly when an editor is in the best position to present it to the BERNSTAINS. Whether this is what actually happened speaks to the credibility of MS. SCHULMAN and the BERENSTAINS--certainly a material triable issue of fact.

11. THE DEPOSITION TESTIMONY OF JANET SCHULMAN AND THE BERENSTAIN's IS UNBELIEVABLE.

Defendant SCHULMAN stated in unqualified terms that she "had never read 'The Easter Hippopotamus'" (SCHULMAN depo., p. 31, lines 6-14). She also stated that the only time she had seen it was after the lawsuit was filed "when I was served." (SCHULMAN depo., p. 31, line 11-14). Yet she does an about-face later in her pre-trial examination that yes, she had seen "The Easter Hippopotamus" (the manuscript) through her then assistant MERRILL WOLF, which manuscript was returned

to BERTHA KLAUSNER, Plaintiffs' literary agent in December of 1980:

> "She showed it to me and when I saw and looked at maybe three pages, read one ___ or two pages of it . . . . . ." (Emphasis supplied.)
>
> SCHULMAN goes on to say at page 34, lines 8-15: "Based on my not having read the entire manuscript, I mean based on three or four pages ____"
>
> ". . . it didn't scan well and there were a lota very forced rhymes . . . ."

Thus, between August, 1980 and December, 1980, the Hippopotamus" manuscript was submitted to Random House twice. DEFENDANTS ADMIT THAT THE WORKS WERE CREATED "DURING APPROXIMATELY THE SAME TIME PERIOD." (Defendants' Summary Judgment Motion, p. 12, lines 4-6). Given this admission and given the fact that independent creation is disputed -- a triable issue of fact remains as to whether or not "Hippopotamus" was copied.

12. THE BERENSTAINS' CALENDAR AND EARLY DRAFTS ON THE SCRIPT WERE FABRICATIONS CREATED FROM THE SHOOTING SCRIPT IN AN ATTEMPT TO CREATE DOCUMENTATION PREDATING THE RANDOM HOUSE ACCESS.

Petitioners offered a succinct analysis of the purported evolution of the "Easter Surprise." Draft 5 of the "Easter Surprise" dealt with the concept of the seasons getting stuck. Yet, strangely enough, Draft 4 made no mention of any kind of "weather crisis"-- a concept critical to the story.

Moreover, in BERENSTAINS' purported calendar notes of 1978 is found: "the weather got stuck, the seasons got stuck." Yet such an important concept does not appear on the early drafts of Easter Surprise. In Draft 4, the only weather crisis mentioned is "the seasons are changing."

The inference to be drawn from these facts is that the early Drafts of Easter Surprise were not "early drafts" at all: they were fabricated from draft 5 of the shooting script because the Weather Crisis, important

as it is, would have been copied through every draft in an evolutionary process. Instead, it mysteriously only reappears in the shooting script though absent in drafts 1, 2, 3, and 4.

13. REPRODUCTION OF THE ILLUSTRATIONS IS FURTHER EVIDENCE OF COPYRIGHT INFRINGEMENT

Finally, Plaintiffs have charged Defendants with infringing their copyrighted drawings. This evidence plainly shows that the BERENSTAINS must have had access to the Plaintiffs drawings through Random House. One's immediate reaction to the drawings in dispute is that they are "virtually the same." Only after close examination can minor differences be discerned. The composition, dress, colors, cropping, even attitude, are a dress down from traditional notions of the Easter Bunny. To show dignity and wisdom, despite a declining attitude, the Easter Bunny wears a vest and glasses. These strikingly similar methods of illustration cannot be explained other than by copying.

Another "striking similarity" is the expression of the Easter Bunny "helpers". They are dressed exactly like each other. Similarly, the flowers hanging from the door frame in "The Easter Hippopotamus" at page 54a also appear in "Surprise" and they are unique because they do not exist in reality except in the mind of Plaintiff, MRS. MAHR.

Such striking similarities in the Easter Bunny, imaginary flowers, and the "bunny helpers" unquestionably outweighs any of the slight differences that may exist. In these drawings, the BERENSTAINS were careful to introduce only enough differences to argue about. Such a reproduction of illustrations from a protected work cannot be considered a fair use because Plaintiffs' work is creative, not informative, and must be afforded even greater protection.

Certainly, Defendants did not borrow the illustrations to criticize or protest the content of the MAHRs presentation of Easter as a commentary on the statements made in

their work. Defendants' objectives were only financial in nature.

This Court in Sony Corp. of America vs. Universal City studios, 464 U.S. 17, 220 U.S.P.Q. 665 (1984), has held that any unauthorized reproduction of a copyrighted work for commercial purposes is presumptively unfair. Thus, absent a privileged fair use defense, Defendants' acts of infringement are substantial. In short, Defendants' virtual reproduction of illustrations is not, and cannot be, fair dealing.1/

14. THE FAIR USE DOCTRINE AND THE IDEA/EXPRESSION DICHOTOMY ARE NOT THE SAME AND WHERE WORKS OF FICTION ARE CONCERNED THE TEST FOR INFRINGEMENT IS A "TOTALITY CONCEPT."

According to Hoehling vs. Universal City Studios, 618 F.2d 972 (2d Cir. 1980), where

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1/ It is interesting to note that in the defendants' efforts to prove independent creation the shooting script of Easter Surprise misspells the word despair (dispair). This is crucial because this same misspelling occurs on page 45 of the Easter Hippopotamus and is the only misspelled word in the shooting script on page 20.

factual information or history is in issue, the idea/expression dichotomy is easily applicable because section 102(b) is inherently concerned with facts and information. Hoehling took great care to distinguish works of fiction "where the distinction between an idea and its expression is especially elusive." On the other hand, a proper interpretation of Hoehling forbids, inter alia, only claims of copyright in facts and information. Section 102(b) comes into play only in that regard and codifies the case law. But, where fictional works are concerned, copyright is not concerned with dissemination of information qua information or ideas per se, but rather with creativity.

Therefore, a "fair use" standard appropriately encourages creativity by keeping separate the idea/expression dichotomy. Copyright and fair use are not concerned with information or ideas per se. This Court recently proposed

a content analysis approach to unpublished works establishing that perhaps any use of an unpublished work may be infringing. Harper & Row vs. Nation, supra.

The Second Circuit in Iowa State Research Foundation, Inc. vs. American Broadcasting companies, 621 F.2d 57, 60 (2nd Cir. 1980), correctly traced the fundamental purpose of fair use as an incentive to creativity. The United States Supreme Court in Harper, (supra) did not confuse the idea/expression dichotomy and fair use, nor did it misconceive their respective roles. Iowa State was quoted in Harper & Row:

> "The doctrine of fair use, originally created and articulated in case law permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster. (Emphasis supplied.)

Contrary to popular belief, the fair use doctrine and the idea/expression dichotomy are not the same. Rigid restriction of the

dissemination of information is prevented by section 102(b). Rigid restriction of creativity is prevented by the "fair use" doctrine. It prevents others from reproducing extensive individual expression without consent either quantitatively or qualitatively. (See Judge Phaelzer's brilliant analysis in Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983), on this issue.)

ATTORNEY'S FEES

In 1980 28 U.S.C. section 1927 attorneys fees were restricted to clerk's and marshall's fees, court reporter charges, printing and witness fees, copying costs, interpreting costs and the fees of court appointed experts. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). Since then Congress amended the statute to include attorneys' fees. Sanctions, however, remain limited to attorneys whose conduct is both unreasonable and vexatous. Section 1927 sanctions must show that the attorney acted in "bad faith." Section 1927 does not,

however, authorize the imposition of damages and costs upon parties. Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986).

Another source of sanctioning power is Rule 11. It applies to attorneys as well as parties. It concerns itself with motions and other papers of a party who has signed a pleading, motion, or other paper. The signature is a certificate that whatever is signed by him or her warrants that the papers, motions, or pleadings are well grounded in fact and is warranted by existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. etc.

Rule 11 goes on to say that if a "signature" appears in violation of the rule the court may impose upon the person who signed the pleading, motion, or paper, a represented party, or both, sanctions including reasonable attorney's fees.

F.R.C.P. 11, 97 F.R.D. 165, 167-68, 196-97.

In this case the lower courts specifically imposed sanctions solely because the attorney in their view was unable to control his wife thus imputing her act upon him. In this regard the lower courts erred. Rule 11 cannot apply to the instant case. The existing standards for the sufficiency of pleadings, motions, or papers has nothing to do with a lawyer's wife's letter written independently of the attorney.

The fact remains that what women do is not determined by men. No longer must they have the consent of their husbands to do things.

How is it possible that the Ninth Circuit could honestly believe that an innocent party can be held responsible in sanctions for an act not committed by his attorney but an independent third party?

It is time to halt the Nintth Circuits unreasonable arrogance of power.

FINAL JUDGMENT RULE

In this case the district judge was ruling on the same substantive question as the appellate court: the merits of the copyright action and sanctions for Rule 11 violations. The district court reserved the right to modify its decision in the matter. Two courts with the power to decide the same issues at the same time, each with the power to reach contrary results. This reservation of power, with its concomitant confusion and waste of time, is exactly the very thing that justifies the final judgment rule . Did the Ninth Circuit have appellate jurisdiction when a lower court reserved its power to make disciplinary fee awards?

In the instant case the question of the frivolousness of the Mahrs' suit was a matter involved in the original appeal. Therefore this Court should hold that the appellate court was without jurisdiction to affirm the award because the district court was never divested of jurisdiction.

1. Does a filing of a Notice of Appeal from an entry of summary judgment divest the district court of jurisdiction where the district court reserves its power to award attorneys' fees?

2. Was the filing of a Notice of Appeal to the Ninth circuit an effective filing with respect to all matters involved in the Appeal?

The answer to both questions is a resounding No! An Appellate court acts beyond its jurisdiction in awarding attorneys' fees after a Notice of Appeal has been filed and when the lower court has <u>at the same time</u> reserved its power to reconsider the same matters on Appeal.

<u>CONFLICT IN THE CIRCUITS</u>

There is a conflict in the circuits as to whether an appellate court acts beyond its jurisdiction in awarding attorneys' fees, and thus affirms a district courts judgment, where the district court has not divested itself of jurisdiction insofar as attorneys'

fees awards are concerned. The Fourth Circuit has held that the award must be made before the appeal is noticed, or after remand. Wright v. Jackson, 522 F.2d 955, 957 (4th Circuit 1975). The court was against piecemeal appeals.

The Seventh Circuit concluded that an appeal does not foreclose an award of attorneys' fees by the district court. Terket v. Lund, 623 F.2d 29, 34 (7th Cir. 1980) (dictum)

The Ninth Circuit has held that jurisdiction over a case is immediately transferred to the court of appeals upon the filing of a timely and sufficient notice of appeal "with respect to any matters involved in the appeal." G & M, Inc., v. Newbern, 488 F.2d 742, 746 (9th Cir. 1973) (quoting 9 J. Moore, Federal Practice s 203 11 (2d ed. 1971) (emphasis supplied). See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 103 S. Ct. 400, 402, 74 L.Ed 2d 225 (1982) (per curiam).

In the district court and again in the appellate court the Merits of the underlying action were always in question. The Ninth Circuit was asked to consider the merits of the Mahrs' action for infringement.

Respondents will no doubt argue fee awards in a line of Civil Rights cases and make no distinction concerning fee awards assessed to penalize bad faith conduct. But where jurisdiction over a case shifts, as the case may be, from the district court to the court of appeals, a reservation of the power to award fees may not be made.

Conversely, a fee award made de novo by an appeals court, when jurisdiction has not shifted, because of a jurisdictional reserve of power, precludes appellate jurisdiction. Though exceptions to this rule may exist, no exception seems to apply in this case. The Ninth Circuit quite simply did not have exclusive appellate jurisdiction.

Thus, if a federal district court decides that plaintiff is liable to

defendant, but reserves the right to modify damages, there is no final decision within the meaning of 28 U.S.C. 1291 or Rule 54(b)

Therefore, irrespective of the phrase "no just reason for delay," since the district court judgment was subject to reconsideration and/or revision either by the same judge, a successor judge or even a different judge, to whom the case might be assigned, the appellate court clearly lacked appellate jurisdiction. The district court in its finding of facts and conclusions of law specifically reserved power in paragraph 21, which states:

> "The court reserves its right to make further conclusions of law relating to claims of costs and attorneys fees by defendants"

An adjudication fully disposing of "fewer than all the claims on the rights and liabilities of fewer than all the parties" is interlocutory under 54(b), as amended; but the district court can make that adjudication final by executing its certificate.

On the other hand, the rule gives the district court no certificatory power to make a partial adjudication of one claim final. The court has discretionary power to make as adjudication that fully disposes of one claim by executing its certificate.

But the claim must be fully disposed of -- which precludes any reservation of power coequal with the appellate court.

The district court abused its discretion, and the court of appeals should have vacated the supposed order of certifications thus restoring the interlocutory charactor of the adjudication because the Rule was inapplicable. Liberty Mutual Insurance Co. v. Wetzel, 424, U.S. 737, 96 S. Ct. 1202.

Finally, the question as to the First Amendment implications of the practice of penalizing lawyers for the actions of independent citizens, who speak out to criticize the court, is a novel and substantial one which has not been treated

before by this Court.

CONCLUSION

For all the reasons set forth above this court should reverse the lower Courts and order that

(1) Rule 11 sanctions against an attorney and/or his clients, where the attorney's wife writes a letter to the court, are not proper sanctions for the sole reason that the attorney did not control his wife's behavior.

(2) there are material triable issues of fact for a jury to pass upon regarding access, given that Random House was in possession of the work as early as August 1980 during the crucial time period;

(3) that an additional question to be resolved is whether Defendants made any unfair use of a sufficient amount of Plaintiffs' copyrightable matter to constitute infringement;

(4) that there are triable issues of fact raised by experts PROFESSOR CONDREN and

DR. GRAVES as to striking similarity because the CONDREN Declaration, unrebutted, precludes any possibility of independent creation, coincidence, or prior common source;

(5) defendants' attempts to prove independent creation depends for its determination on the reliability of their testimony which is better suited for the trier of fact;

(6) appellees' failure to adequately protect the preproduction tapes on the issues of independent creation mandates a trial on the issue, and

(7) that when a court reserves jurisdiction on the merits of a case, or fails to finally dispose of the claim certified, no appellate court has valid jurisdiction irrespective of Rule 54(b).

For these reasons, this court should grant the Writ.

DATED: June 11, 1987

Respectfully submitted,

RALPH F. SERVER
Attorney for Petitioner

LAWRENCE R. BARBA
Attorney of Record

AFFIDAVIT OF MAILING

I, Lawrence R. Barba, am a member of the Bar of the Supreme Court of the United States and counsel of record for Douglas James Mahr and Mary Elizabeth Mahr petitioners herein, hereby certify that on June 16, 1987, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the respondents herein by depositing such copies in the United States Post Office, Beverly Hills, California, with first class postage prepaid, properly addressed to the Post Office address of:

Richard R. Murphy
Attorney at Law
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Timothy D. Reuben, Esq.
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Supreme Court
1 First Street, N.E.
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DATED: June 16, 1987

Lawrence R. Barba
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9460 Wilshire Blvd.,
Ste 520
Beverly Hills, CA 90212

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS JAMES MAHR and MARY ELIZABETH MAHR, Plaintiffs-Appellants, vs. NATIONAL BROADCASTING COMPANY, INC. et al., Defendants-Appellees.	Nos. 85-6114 85-6115 85-6116 MEMORANDUM*
DOUGLAS JAMES MAHR and MARY ELIZABETH MAHR, Plaintiffs-Appellants, vs. NATIONAL BROADCASTING COMPANY, INC. et al., Defendants-Appellees.	

*The disposition is not intended for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

DOUGLAS JAMES MAHR and MARY ELIZABETH MAHR,

Plaintiffs-Appellants,

vs.

NATIONAL BROADCASTING COMPANY, INC. et al.,

Defendants

and

RANDOM HOUSE, INC. and JANET SCHULMAN,

Defendants-Appellants.

Appeal from the United States District court for the Central District of California

A. Andrew Hauk, Senior U.S. District Judge, Presiding

Argued: January 7, 1987; Pasadena, California
Submission Deferred: January 7, 1987
Resubmitted: February 19, 1

Before: KENNEDY and POOLE, Circuit Judges, and LOVELL,** District Judge.

Appellants Douglas and Mary Mahr appeal from the district courts grant of summary judgment to defendants and award of approximately $22,000 in sanctions in the form of attorney's fees and costs. Appellees cross-appeal contending that the award of attorneys fees and costs were insufficient, but urge that we affirm the

district court in all other respects. We affirm the district court.

Initially, appellants claim that we are without appellate jurisdiction because of the Berenstains' unresolved counterclaim for defamation. However, this case was appropriate for certification as a final judgment under Federal Rule of Civil Procedure 54(b), and the district court so certified the case. Therefore, we have appellate jurisdiction under 28 U.S.C. s 1921.

Appellants claim that the appellees' production of a television cartoon special, "The Easter Surprise," infringed on their copyrighted novelette, The Easter Hippopotamus." It is undisputed that the appellants own the copyright to "The Easter Hippopotamus." Thus, the only issue is whether the appellees infringed on this copyright.

In this circuit, absent direct evidence of copying, a copyright plaintiff must show that the defendant has access to the copyrighted work, and that the defendant's work is substantially similar to the copyrighted work.

Substantial similarity must be both extrinsic, i.e. the ideas must be similar to the work, and intrinsic, i.e. the expression of these ideas must be similar to the copyrighted work. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977). Summary judgment is appropriate if the moving papers reveal that there is no material issue of fact on either of these elements.

The appellants have failed to show that the appellees had a reasonable opportunity for access. In Jason v. adopted, 698 F.2d 966 (9th Cir. 1982), we held that a bare possibility of access to the work does not create a material issue of fact as to access. In Jason the plaintiff had printed approximately 1,100 copies of a copyrighted book. Several hundred copies of her book were sold through Southern California bookstores before the production of the movie that allegedly infringed on her copyright. The court concluded that this was insufficient to show a reasonable opportunity to view the copyrighted work Id. at 776-77.

The opportunity of anyone involved in the production of "The Easter Surprise" to view the allegedly infringed work here was even less than in Jason. Appellants' theory is that their submission of "The Easter Hippopotamus to Random House Publishing Company in August of 1980, and again in December of 1980, is the route through which their work was copied. Appellants argue that since Random House also published a series of childrens' books by defendants Stan and Jan Berenstain, there is a reasonable chance that the Berenstains viewed "The Easter Hippopotamus" before creating "The Easter Surprise." This theory, however, ignores several key facts. First, all of the defendants involved in the production of "The Easter Surprise" unequivocally denied having seen appellants' work. The only persons to see the appellants' book at Random House were the reviewing editors, who promptly dispatched rejection letters. Second, records and notes show that the sound track for "The Easter Surprise" was recorded well before "The Easter Hippopotamus" was received at Random House, and that "The Easter

Surprise" was in formulation well before that. All the appellants' cries of fraud and deception cannot substitute for a shred of evidence. Therefore, the only opportunity for the appellants to view "The Easter Hippopotamus" would have been the single copy deposited with the copyright registration. This is not a reasonable opportunity to view the work.

Appellants attempt to overcome the access hurdle by arguing that their experts' declarations created a jury question as to whether the works were so "strikingly similar" as to obviate the need to show access. Appellants cite Selle v. Gibb, 741 F.2d 896 (7th Cir. 1983), and Stratchborneo v. ARC Music Corp., 357 F. Supp. 1393 (S.D.N.Y. 1973), for their assertion that copyright plaintiffs need not show access in such a case. Even if we were to conclude that these cases are persuasive, they are not helpful to the appellants. Both of these cases are persuasive, they are not helpful to the appellants. Both of these cases discuss defendants' access in some detail. In both cases, the courts required at least some minimal

showing of access. The strikingly similar rule does not seem to be so much an elimination of the access requirements as one end of the continuum drawn by the inverse relationship between access and similarity. See Selle, 741 F.2d at 903, n.4; Krofft, 562 F.2d at 1172 (citing Professor Nimmer's formulation of the inverse ratio rule). In any event, the works here are not strikingly similar, or even substantially similar. Our review does reveal some similarities at a general level. However, the fact that both works deal with the possibility that Easter will not come due to a force majeure and a reluctant Easter Bunny is hardly grounds for concluding that the works could not possibly have been created independently.

We turn to the question of fees and costs. We disagree with the appellees that the district judge abused his discretion in not granting full attorney's fees and costs under the copyright act. See 17 U.S.C. s 505. We acknowledge that the plaintiffs' case is weak in the extreme, and if the matter were left to our sole discretion,

we might have granted the fees requested. But the discretion is vested in the district court, and we cannot say that the district judge's refusal to grant fees was an abuse of his authority. This was an almost worthless lawsuit, but we conclude that the slight similarity of the works gave the district court discretion to conclude that the suit was not "frivolous" as that term is used in the act.

The imposition of fees and costs based on the delay in the litigation caused by appellants' first counsel presents some more difficult questions. As a threshold matter, we normally would not countenance an imposition of sanctions for counsel misconduct under 28 U.S.C. s 1927 or Federal Rule of Civil Procedure 11 based solely on the actions of counsels spouse. We agree with the appellees that the letter written by original counsels spouse, criticizing the district judge, and urging him to rule for the appellants, was rude and offensive. This alone is not enough to impute the spouse's conduct to the attorney. However, appellants' first counsel's declaration indicates that he knew of

the letter and its contents, and gave his ringing endorsement to his spouse's actions. Thus, we conclude that the district judge could justifiably impute her actions to the attorney.

We also agree that the letter constituted the sort of conduct proscribed by 28 U.S.C. s 1927. The letter required transfer of the case to another district judge and resulted in a completely unnecessary delay in the litigation. Under section 1927, the district judge could impose sanctions in a sum reflecting the costs and fees necessitated by the delay. There was evidence in the record to support the amount of the fees set by the court.

As to costs and fees incurred by the parties on this appeal, we make the following order: (1) appellants bear the costs of both sides for their appeal; (2) each side bears its own costs on appellees' cross-appeal; and (3) no attorney's fees are awarded to either side on the appeal.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS JAMES MAHR and MARY ELIZABETH MAHR, Plaintiffs, vs. NATIONAL BROADCASTING COMPANY, INC., RCA CORPORATION, JOSEPH CATES Co., INC., PERPETUAL MOTION PICTURES, INC., RANDOM HOUSE, INC.; HOUSE, INC.; JANET SCHULMAN, STAN BERENSTAIN and JAN BERENSTAIN, Defendants	Nos. CV 82-4897 AAH STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW PURSUANT TO LOCAL RULE 7.14.1

Defendants National Broadcasting Company, Inc. ("NBC"), RCA Corporation ("RCA"), Joseph Cates Co., Inc. ("Cates") Perpetual Motion Pictures, Inc. ("Perpetual"), Stan Berenstains"), Random House, Inc. ("Random House"), and Janet Schulman ("Schulman"), have moved for summary judgment.

The Court, having studied, analyzed and reviewed all pleadings and papers on file herein, including declarations, depositions,

answers to interrogatories, evidence and memoranda of law, and having on April 3, 1985 heard argument of all parties, and having also on that date reviewed the videotape, Ex. 101, in open court containing both versions of the allegedly infringing work "The Berenstain Bears' Easter Surprise" and having also carefully studied and reviewed the plaintiffs' work "The Easter Hippopotamus," pursuant to Local Rule 7.14.1 now finds and concludes:

UNCONTROVERTED FACTS

1. In March 1978, plaintiffs Douglas James Mahr and Mary Elizabeth Mahr started work on a manuscript entitled "The Easter Hippopotamus."

2. Plaintiff Douglas Mahr first copyrighted the text for "The Easter Hippopotamus" in March 1980, and after making certain revisions, secured a second copyright for the work in October 1980.

3. Plaintiff Mary Mahr copyrighted the illustrations for "The Easter Hippopotamus" in July 1980.

4. In November 1978, defendants Stan and Jan Berenstain first had the idea to create an

Easter television show for children based, in part, on their 1974 Berenstain Bears; book entitled The Berenstain Bears' New Baby.

5. In January 1979, Joseph Cates, President of Joseph Cates Co., Inc., agreed to produce the Berenstains' television specials, including "The Berenstain Bears' Easter Surprise."

6. In early 1980, defendant NBC agreed to purchase three Berenstain Bears' shows, including "The Berenstain Bears' Easter Surprise," and to televise these shows on network television.

7. On May 20, 1980 defendant Stan Berenstain delivered his script for "The Berenestain Bears' Easter Surprise" to defendants Cates and Perpetual.

8. Between June 18 and June 24, 1980 the audio portion of "The "The Berenestain Bears' Easter Surprise" was recorded in New York City.

9. On August 24, 1980 the final storyboard for "The Berenestain Bears' Easter Surprise" was completed.

10. In September 1980, Perpetual began animation for "The Berenestain Bears' Easter

Surprise" using the completed storyboard.

11. On April 14, 1981 "The Berenstain Bears' Easter Surprise" first aired on network television. See Ex. 101 as marked in court proceedings (second show on tape).

12. On April 6, 1982 "The Berenstain Bears' Easter Surprise" aired again on network television. See Ex. 101 as marked in court proceedings (first show on tape). This second broadcast was identical to the first broadcast, except that approximately 30 seconds were deleted from the show at NBC's request. The Court finds that the 30 second deletion consisted of shortening the breaks on blank tape portions between segments of the actual show. The blank portions contained commercials and other announcements in the broadcast of the show. In all other respects, the two versions are identical.

12. Defendants Random House and Schulman did not participate in any way in the creation, development or production of "The Berenstain Bears' Easter Surprise."

14. Defendant Random House did not receive a

complete copy of "The Easter Hippopotamus" until December 1980, which was three months after Cates, Perpetual and the Berenstains had completed all but the individual frames for animation of "The Berenstain Bears' Easter Surprise."

15. Merrill Wolf, then assistant to defendant Schulman, returned plaintiffs' manuscript to Bertha Klausner, plaintiffs' literary agent, in December 1980 with a letter indicating that Random House was not interested in publishing "The Easter Hippopotamus."

16. Defendant Schulman did not see a complete copy of "The Easter Hippopotamus" until April 1981.

17. In April 1981, defendant Schulman returned plaintiffs manuscript to Bertha Klausner with a rejection letter, indicating that Random House was not interested in publishing "The Easter Hippopotamus."

18. Neither defendant Schulman nor any other representative of defendant Random House copied or used any portion of "The Easter Hippopotamus" for any purpose whatsoever.

19. Defendants NBC, RCA, Cates, Perpetual and the Berenstains had absolutely no knowledge of "The Easter Hippopotamus," nor did any of these defendants or their representatives ever see a copy of the work or speak to, or have any contact with defendant Schulman or any other representative of defendant Random House or anyone else about ""The Easter Hippopotamus" until after "The Berenstain Bears' Easter Surprise" aired on network television on April 14, 1981.

20. Defendants NBC, RCA, Cates, Perpetual and the Berenstains did not copy or use any portion of "The Easter Hippopotamus" for any purpose whatsoever.

21. Defendants NBC, RCA, Cates, Perpetual and the Berenstains did not have access to the Easter Hippopotamus."

22. After making a detailed comparison of the two works, the Court finds there is no substantial similarity of ideas or expression between "The Easter Hippopotamus" and "The Berenstain Bears' Easter Surprise." For example, the defendants' work concentrates on

the development of the characters of the Bear family, and involves the theme of the miracle of birth. The "Mother Bear" gives birth at the end of the program to "Sister Bear," who thereafter gives "Brother Bear" companionship, and it is this birth which is the Easter Surprise." The plot of defendants' work also involves the "Brother Bear" attempting to find the Easter bunny. The Easter BUnny, who had quit, is ultimately convinced to return to his task after seeing a rainbow. The defendants' work also contains several musical numbers which develop the characters; however, "The Berenstain Bears Easter Surprise" contains no little children or any relationship between the Bear family and children, no mayor of the town, and no parents of children. There is no strike of the children against the parents, which is present in "The Easter Hippopotamus."

In plaintiffs' work, the hippopotamus attempts to become the Easter Bunny, looks after the children, saves them, and leads the children around. The children strike against the parents and the major makes a speech to the town council

and the parents. There is no music at all. "The Easter Hippopotamus" uses caricatures to develop a metaphysical, mythological, religious theme; however, none of that whatsoever exists in concept, mood, feel, dialogue or character in the defendants' work. These are but a few examples of the striking differences and the complete lack of similarity between the two works and there are simply no significant similarities.

23. There is no substantial similarity between "The Easter Hippopotamus" and "The Berenstain Bears' Easter Surprise" as to any matter protected under the federal copyright laws.

24. "The Berenstain Bears' Easter Surprise" was created independently of "The Easter Hippopotamus."

25. There is no triable issue of material fact.

26. The plaintiffs filed their complaint on September 31, 1982. Other pendent state claims for emotional distress, libel and implied contract where filed by plaintiffs against

defendants but those claims have been dismissed per two stipulations both of which were lodged March 7, 1984 and entered March 15, 1984.

27. The court hereby reserves its right to consider and make uncontroverted findings of fact relating to costs and attorney's fees of defendants based on evidence and arguments at a later hearing of those issues.

CONCLUSIONS OF LAW

1. Any Uncontroverted Fact which should be deemed a Conclusion of Law is hereby adopted as such.

2. Any Conclusion of Law which should be deemed an Uncontroverted Fact is hereby adopted as such.

3. This is a civil action brought under the Copyright Act (17 USC s 1) of the United States. The court has jurisdiction of this action pursuant to Title 28 U.S.C. s 1338.

4. To prove copyright infringement, the plaintiff must show: (1) ownership of the copyright; (2) access to the copyrighted work, and (3) substantial similarity between the copyrighted work and the defendant's work.

Litchfield v. Spielberg, 736 F.2d 1352 (9th Cir. 1984); Sid and Marty Kroft Television v. MacDonald's Corp., 562 F.2d 1157 (9th Cir. 1977)

5. Absent evidence of direct copying no inference of copyright infringement is raised unless plaintiffs can show that the creators of the allegedly infringing work has access to plaintiff's work; a "bare possibility" of such access is insufficient. Jason v. Fonda, 526 F. Supp. 772, 777 (C.D. Cal. 1982), aff'd 698 F.2d 966 (9th Cir. 1983).

6. Defendants NBC, RCA, Cates, Perpetual and the Berenstains didn not have access to "The Easter Hippopotamus" prior to April 14, 1981, at which time "The Berenstain Bears' Easter Surprise" had already been created and substantially completed. Since there is no issue of fact on this essential element necessary to prove copyright infringement, summary judgment on behalf of defendants and against plaintiffs is appropriate.

7. To prove infringement, plaintiffs must show that the protected portions of their work are substantially similar in both ideas and

expression to the defendants' work, Kroft, supra. Summary judgment is also appropriate on an additional basis if reasonable minds could not differ as to the absence of substantial similarity between the two works. Before considering a motion for summary judgment on the issue of substantial similarity, the court must make a detailed comparison of the allegedly infringing and infringed works. When reviewing a motion for summary judgment, the evidence and inferences must be viewed in the light more favorable to the plaintiffs. Litchfield v. Spielberg, supra.

8. In determining whether there is similarity of ideas, the Court must use an extrinsic test which focuses on alleged similarities in the objective details of the works. The extrinsic test requires a comparison of plot, theme, dialogue, mood, setting, pace and sequence. Litchfield, supra; Kroft, supra. Here, there is no substantial similarity between the sequences of events, mood, theme, setting, pace sequence, dialogue and characters of the two works. Any similarities in plot exist only

at the general level for which plaintiff cannot claim copyright protection. For example, whereas defendants work concentrates on the development of the characters and the relationships between them, plaintiffs' work uses caricatures to develop its religious theme.

9. Similarity of expression depends on a subjective, intrinsic test. This test focuses on the response of the ordinary reasonable person. There is simply no similarity of expression to constitute infringement of expression, the total concept and feel of the works must be substantially similar. No lay observer would recognize defendants' work as a dramatization of picturization of plaintiffs' work Litchfield, supra; Granite Music Corp. v. United Artists Corp., 532 F.2d 718, 720 (9th Cir. 1976).

10. A copyright protects only the particular expression of an idea, not the idea itself. The basic idea and theme of a work, locale and settings, its characters and its basic plot are not protectable by copyright. Kroft, supra; Columbia Pictures Corp. v. National Broadcasting

Co., 137 F. Supp. 348 (S.D. Cal. 1955.)

11. Unoriginal elements of a work are not protectable by copyright. Roth Greeting Cards v. United Cards Co., 429 F.2d 1106 (9th Cir. 1970).

12. Similarities between the two works that arise because both are based on common sources are not protectable under copyright law. Harold Lloyd Corp v. Witwer, 65 F.2d 1, 23, 24 (9th Cir. 1933).

13. Scenes-a-fair," that is, thematic concepts, scenes, incidents, characters or settings that necessarily follow from similar plot situations or settings are not protectable under copyright law. See v. Durang, 711, F.2d 141 (9th Cir. 1983); Jason v. Fonda, supra.

14. In the COurts view, there are no similarities in expression between the two works in question. However, if there are any similarities, they relate to elements in plaintiffs' work not protected by copyright law.

15. There is no substantial similarity, or any similarity between "The Easter Hippopotamus" and "The Berenstain Bears' Easter Surprise" in

any matter protected under the federal copyright laws. Plaintiff's case rests ultimately on alleged showings of similarities which range from the patently erroneous to the ridiculous, or involve palpable trivialities.

16. Proof of independent creation is a complete defense to a claim of copyright infringement. Granite Music Corp. v. United Artists Corp., supra.

17. "The Berenstain Bears' Easter Surprise was created independently from "The Easter Hippopotamus."

18. There is no genuine issue of material fact raised by the first claim of the complaint (copyright infringement). The other claims against defendants were dismissed by stipulation.

19. By reason of the foregoing Uncontroverted Facts and Conclusions of Law, and inasmuch as no genuine issue as to any material fact exists with respect to the first claim, defendants NBC, RCA, Cates, Perpetual, the Berenstains, Random House and Schulman are each entitled to entry of summary judgment as a matter of law on the first

claim. Plaintiffs copyright infringement claim is without merit and is therefore dismissed. There is no just reason to delay entry of judgment; accordingly, summary judgment is hereby directed forthwith in favor of each of the defendants and against plaintiffs.

20. This Court's ruling is a final judgment with respect to plaintiffs' claims against defendants.

21. The Court reserves its right to make further conclusions of law relating to claims of costs and attorneys fees by defendants.

DATED: June 10, 1985

A. Andrew Hauk
(Original Signed)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS JAMES MAHR, et. al., Plaintiffs, vs. NATIONAL BROADCASTING COMPANY, INC., etc., et al., Defendants.	Case NO. CV 82-4897 AAH JUDGMENT

The motions for summary judgment by defendant Random House, Inc. ("Random House"), Janet Schulman ("Schulman") National Broadcasting Company ("NBC"), RCA Corporation ("RCA"), Joseph Cates Company, Inc. ("Cates"), Perpetual Motion Pictures, Inc. ("Perpetual"), Stan Berenstain and Jan Berenstain (Collectively referred to as "the Berenstains"), as to the first and only remaining claim of plaintiffs complaint for copyright infringement, came on regularly for hearing on April 3, 1986 before the Honorable A. Andrew Hauk, United States District Judge. Random House and Schulman appeared through their attorneys of record, Gibson, Dunn & Crutcher, by Rex Heinke defendants NBC, RCA, Cates, Perpetual

and the Berenstains appeared through their attorneys of record, Rosenfeld, Meyer & Susman, by Timothy D. Reuben; plaintiffs Douglas James Mahr and Mary Elizabeth Mahr appeared through their attorney of record, Richard R. Murphy.

The court reviewed the allegedly infringing material in open court and reviewed all pleadings and papers submitted by all parties. Having reviewed and analyzed both the allegedly infringing material and read the plaintiffs' work and considered all pleadings, papers, documents, exhibits, declarations, affidavits and other evidence and materials on file herein, and having considered all arguments by both sides, and having filed and entered its Findings of Uncontroverted Facts and Conclusions of Law pursuant to Local Rule 7.14.1, and good cause appearing.

WHEREFORE, THE COURT ORDERS that summary judgment is granted to all defendants and that judgment be entered in favor of all defendants and against both plaintiffs forthwith and that plaintiffs' complaint be dismissed in its entirety with prejudice.

IT IS FURTHER ORDERED that plaintiffs pay random house and Schulman $12,433.00 for their attorneys' fees and costs in the amount of $39 and $5,320.00 for their attorneys' fees and costs in the amount of $3,560.95.

IT IS FURTHER ORDERED that pursuant to 28 U.S.C. section 1927 and Federal Rules of Civil Procedure, Rule 11, plaintiffs attorney, Richard R. Murphy, is jointly and severally liable with plaintiffs to Random House and Schulman for the sum of $12,826.00 for their attorneys' fees and costs and that plaintiffs' attorney, Richard R. Murphy, is jointly and severally liable with plaintiffs to NBC, Cates, Perpetual and the Berenstains for the sum of $8,880.95 for their attorneys' fees and costs as a result of his improper actions in creating extra cost and delaying these proceedings and his unreasonable prosecution of plaintiffs' second, third and fourth claims.

IT IS SO ORDERED.

DATED: June 10, 1985

_____
A. ANDREW HAUK, Judge
United States District Court

SUBMITTED BY:

TIMOTHY D. REUBEN
ROSENFELD, MEYER SUSMAN
9601 Wilshire Boulevard
Beverly Hills, California 90210

By_____
TIMOTHY D. REUBEN, Attorney for Defendants NATIONAL BROADCASTING COMPANY, INC., RCA CORPORATION, JOSEPH CATES COMPANY, INC., PERPETUAL MOTION PICTURES, INC., STAN BERENSTAIN and JAN BERENSTAIN

REX S. HEINKE
GIBSON, DUNN & CRUTCHER
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By:_____
REX S. HEINKE, Attorney for Defendants RANDOM HOUSE, INC. and JANET SCHULMAN

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age o eighteen (18) years and not a party to the within action. My business address is 9460 Wilshire Blvd., Suite 520, Beverly Hills, California 90212.

On June 16, 1987, I served the foregoing document described as: Petition for Writ of Certiorari on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

Richard R. Murphy
Attorney at Law
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Clerk, United States
Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

(Original and 40 copies)

I cause such envelope with postage thereon fully prepaid to be placed in the U.S. mail at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed June 16, 1987, at Los Angeles, California.

_____

Marsha A. James